STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2000
v	No. 216178 Van Buren Circuit Court
ANDREW DEAN JOHNSON, Defendant-Appellant.	LC No. 98-011077-FH

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). He was sentenced to seven to twenty years' imprisonment. Defendant appeals his conviction as of right. We affirm.

I

First, defendant asserts that he was deprived of the effective assistance of counsel. Specifically, he argues that the facts supported a defense of intoxication, but that defense counsel ignored this line of defense and followed an unreasonable and unsuccessful theory that defendant was misidentified. When, as here, there has been no motion for a new trial or an evidentiary hearing, a claim of ineffective assistance of counsel is reviewed de novo on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

In order to establish ineffective assistance of counsel, defendant must prove by a preponderance of the evidence that: (1) trial counsel's performance fell below on objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Regarding the first element, competent counsel is presumed as a matter of law. *People v Toma*, ____Mich____; ____NW2d ____ (Docket No. 112860, issued 6/28/00), slip op p 24; *People v Wilson*, 180 Mich App 12; 446 NW2d 571 (1989). A reviewing court starts with a strong presumption that any challenged conduct was sound trial strategy. *Toma, supra*. Appellate courts must remain ever mindful of the stress, intensity and rapid pace of a trial. An appellate court

should refrain from substituting its collective judgment reached with the benefit of hindsight, for that of trial counsel, whose judgment was exercised in the heat of trial. As our Supreme Court warned, "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995).

The second element of an ineffective assistance of counsel claim requires proof from defendant that as a direct consequence of his trial counsel's substandard performance there is "a reasonable probability that, absent [trial counsel's] errors, the fact finder would have had a reasonable doubt respecting guilt." *People v Pickens*, 446 Mich 298, 313; 521 NW2d 797 (1994), quoting *Strickland v Washington*, 446 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see *Toma, supra*. Black's Law Dictionary, (6th ed), defines "probability" as:

> Likelihood; appearance of reality or truth; reasonable ground for presumption; … A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.

Thus, it is not enough to sustain the high burden placed upon a defendant claiming ineffective assistance of counsel that there exists a possibility that had trial counsel's performance not fallen below minimal professional standards defendant would not have been convicted. Defendant must establish that it is more likely than not that but for counsel's unprofessional errors, he would have been acquitted. It is with this standard in mind that we review defendant's claims of ineffective assistance of counsel.

A defense of intoxication is only proper if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent. *People v Mills*, 450 Mich 61, 82-83; 537 NW2d 909 (1995). In this case, there was little evidence in the record of defendant's intoxication. A police investigator testified that witnesses said defendant was drinking earlier in the evening, and that defendant had told him he had been drinking that night, but there was no evidence defendant had been so intoxicated that he did not have a larcenous intent. In addition to the absence of record support for defendant's assertion that a defense of intoxication was warranted, there is nothing in the record to suggest that interposing the defense would have changed the outcome of the trial. Defense counsel's theory of misidentification was reasonable, albeit unsuccessful. In sum, we conclude defense counsel's performance did not deprive defendant of his right to a fair trial.

II

Defendant next contends that there was serious error in the jury instructions, requiring reversal. According to defendant, instructions should have been given on three issues: (1) incriminating, out-of-court statements allegedly made by defendant and introduced through testimony of other witnesses (CJI2d 4.1); (2) intoxication of defendant as a defense to the intent element requisite to the crime charged (CJI2d 6.2); and (3) identification of defendant by the victim (CJI2d 7.8). Defendant did not request these instructions or object to the absence of these instructions at trial. Thus, any resulting error is waived and reversal is not warranted unless relief is necessary to avoid manifest injustice. MCL

768.29; MSA 28.1052, *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Defendant does not specify which of his statements, brought into evidence by police testimony, was incriminating. The record contains only three out-of-court statements made by defendant: (1) that he did not think he was involved in the break-in, (2) that he had been drinking that night; and (3) that sandals recovered by the police were his but he had thrown them away before the break-in. Defendant made no objection to any of these statements during trial and none of these statements is incriminating on its face. We conclude that the outcome of the trial did not turn on any of these statements. We therefore find no error in the trial court's failure to sua sponte give the jury a limiting instruction concerning the statements.

There was likewise no error in omitting the other instructions. The instruction regarding the defense of intoxication was not warranted because intoxication was not a theory argued by defendant. While defendant's possible intoxication was mentioned a few times in testimony, it was not an issue litigated by either party. The instruction concerning identification also would not have changed the outcome of the trial. In addition to the victim's testimony, there was fingerprint evidence, as well as evidence regarding defendant's clothing, that helped prove his identification.

The trial court correctly gave the jury the required instructions. Defendant's argument that a manifest injustice occurred in this case is simply not supported by the record. We conclude there was no error in the trial court's failure to include these instructions *sua sponte*.

III

Finally, defendant argues that the sentence imposed by the trial court was not proportionate, and that the court's reasons were not properly individualized or articulated. This Court reviews a trial court's sentence for abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). The sentencing court must articulate on the record the criteria considered and the reasons for the length and nature of the sentence imposed. *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999). There are no set criteria to be considered, but the court should balance the objectives of reforming the offender, protecting society, punishing the offender, and deterring others from committing similar offenses. *Id.* A sentence can constitute an abuse of discretion if it is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

The sentencing court's reasoning is clear from the record. Although the court indicated that the rehabilitation program preferred by defendant might be helpful to him, defendant's history as a repeat offender, coupled with the seriousness of the crime, created too high a risk to society. The likelihood of danger was increased by the frequency with which defendant broke into houses. Defendant had served two five-year sentences for burglary; these were insufficient to deter him. Under these circumstances, we conclude that the sentence was proportionate. *Milbourn*, *supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Brian K. Zahra